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No. 108, Original

IN THE

Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY BRIEF TO BRIEFS AND THE MEMORANDUM FILED IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

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INTRODUCTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the North Platte River Decree of October 9, 1945, 325 U.S. 665, as modified and supplemented by the Decree of June 15, 1953, 345 U.S. 981, (hereinafter referred to individually and collectively as "the Decree"), to enforce the equitable balance of the North Platte River and its tributaries (hereinafter referred to as "the North Platte system") established by the Decree. Nebraska's initial petition, filed on January 20, 1987, seeks to enforce the Decree and to place restrictions on Wyoming's new and expanded uses of North Platte system waters which violate Nebraska's irrigation apportionment. Nebraska's amended petition realleges Wyoming's violation of Nebraska's irrigation apportionment and further asserts Nebraska's claims for protection of water uses for wildlife habitat in the North Platte system that are and will be adversely affected by new and expanded uses of system waters in Wyoming and Colorado. The

wildlife habitat water uses that Nebraska seeks to protect have existed since the entry of the Decree and their existence has been based upon on the North Platte system flow regimen established by the Decree.

Specifically, Nebraska's amended petition seeks to:

1. Enforce the status quo or equitable balance of the North Platte system established by the Decree and thereby protect Nebraska's apportionment for irrigation uses by imposing restrictions on Wyoming's current and proposed enlargement of water uses which violate the equitable apportionment of the North Platte system;

2. Recognize and establish an equitable apportionment for existing wildlife habitat uses in Nebraska and in the other states in the North Platte system through either construction or modification of the Decree;

3. Establish and impose restrictions on Wyoming's new and enlarged uses of North Platte system waters which reduce or adversely affect the availability of North Platte system waters for wildlife uses in Nebraska;

4. Establish and impose restrictions on Colorado's new or enlarged uses of North Platte system waters which reduce or adversely affect the availability of North Platte system waters for wildlife habitat uses in Nebraska and the other states; and

5. Establish and impose restrictions on the United States' authorization of new storage projects on the North Platte system which reduce or adversely affect the availability of North Platte system waters for wildlife habitat uses in Nebraska and the other states.

REPLY TO WYOMING'S AND COLORADO'S STATEMENTS OF THE CASE

Although the Decree expressly apportioned waters of the North Platte system among the states for irrigation purposes, Nebraska submits that its water use claims for wildlife habitat purposes asserted in the amended petition arise from or were an existing

component of the stream flow regimen established by the Decree. Accordingly, Nebraska does not seek to enlarge its use of North Platte system waters through the relief requested in the amended petition or to disturb or reduce Wyoming's or Colorado's current equitable apportionment. The relief requested in the amended petition simply seeks to enforce the Court's irrigation apportionment as well as to facilitate the perpetuation of the existing but currently unprotected wildlife habitat water uses. Simply stated, the amended petition seeks to maintain the status quo of water uses on the North Platte system resulting from the Decree.

The claims in the amended petition involve water supply shortages that are similar to or greater than the shortages that existed when the Court entered its Opinion and Decree in *Nebraska v. Wyoming*, 325 U.S. 589 and 325 U.S. 665 (1945). In the initial phase of this case, the Court rejected Colorado's motion to dismiss based on the contention that Nebraska had only asserted a potential threat of injury at an indefinite future time. The Court recognized that "deprivation of water in arid or semi-arid regions cannot help but be injurious" and concluded that a justiciable controversy is properly raised under the Court's original jurisdiction where states assert conflicting claims for present uses and projected future uses to the waters of the over-appropriated stream system. *Id.* at 610. Because of the existing over-appropriation of the North Platte system, each of the North Platte system states is a necessary and essential party to the reopening of this case so that the Court can fashion a Decree that protects the equitable balance of the river and recognizes and protects the environmental uses that are part of that equitable balance.

In the amended petition and in Nebraska's supporting brief, Nebraska cites a representative sample of federal environmental legislation enacted since 1945. These legislative enactments are used to illustrate the federal interest in environmental protection which has developed since the entry of the Decree. Nebraska maintains that this federal environmental policy, as well as its own state environmental policy, dictate that existing wildlife habitat uses must be a part of the Court's determination in any reconsideration of the

equitable apportionment of the North Platte system. Consequently, in the amended petition, Nebraska seeks to protect its existing wildlife habitat water uses which are threatened by any disturbance in the status quo of the North Platte system. The relief requested for habitat areas is consistent with fundamental state, regional, national and international environmental objectives.

Nebraska does not seek to enforce the federal environmental legislation cited in its amended petition and supporting brief. The claims asserted in the amended petition concern the apportionment of water rights and not the enforcement of federal environmental statutes. Nebraska's claims for wildlife habitat water uses depend on the stream system regimen established by the Decree. The environmental statutes are not intended to apportion or otherwise establish water rights among states on an interstate stream system.

Wyoming's and Colorado's primary objection to Nebraska's motion for leave to amend its petition is that Nebraska now seeks to expand the intitial petition to include environmental or wildlife issues that were not previously raised. In support of their opposition to the amended petition, Wyoming and Colorado rely on statements made in Nebraska's brief opposing intervention by the Platte River Trust and National Audubon Society, and they claim that Nebraska has abruptly changed its position in the case.

Nebraska acknowledges its past and present opposition to intervention by the Platte River Trust and National Audubon Society. Nebraska objected to intervention by the Platte River Trust and the National Audubon Society because the interests of those organizations were subsumed within the state's exercise of authority *parens patriae*. Nebraska asserts that the environmental interests raised in the Trust's and Audubon's complaints in intervention are interests which were necessarily implicated in the initial petition because they are part of the status quo or equitable balance of water uses in Nebraska established by the Decree. Accordingly, the interests asserted by those organizations were already represented by the state.

Both Colorado and Wyoming ignore the environmental interests raised in the initial petition. In Nebraska's initial brief in support of its motion for leave to file petition, Nebraska asserts the "State of Wyoming's unlawful actions will cause the State of Nebraska to suffer substantial economic, *ecological*, and *environmental injuries*." Nebraska's Brief in Support of Motion for Leave to File Petition at 2 (emphasis added).

Wyoming and Colorado cannot deny the existence of significant and substantial wildlife habitat uses in Nebraska that are based on the regimen of the North Platte system established by the Decree. Nor can they deny that existing wildlife habitat uses in Nebraska will be adversely affected and may eventually be eliminated by new or expanded uses of North Platte system waters in Wyoming and Colorado. Accordingly, Wyoming and Colorado want the Court to limit the scope of Nebraska's petition to the impact of Wyoming's new and expanding uses on Nebraska's irrigation apportionment and to ignore the impact of those uses and any new and expanded uses in Colorado on the survival of existing wildlife habitat uses in Nebraska. This narrow approach serves Wyoming's and Colorado's interests because it allows them to establish new and expanded uses of North Platte system waters at the expense of existing wildlife habitat uses. Nebraska maintains that the equitable balance of the river should not allow the upstream states to establish such new and expanded uses and that any such expansion necessarily depletes existing irrigation and habitat uses.

Wyoming and Colorado also fail to acknowledge that Nebraska's initial petition concerns uses of North Platte system water for wildlife purposes in Nebraska. For instance, the Inland Lakes dispute involves wildlife habitat water uses. In addition, Nebraska's claims in the initial petition regarding Grayrocks Reservoir concern the release of waters from that reservoir to create minimum stream flows for wildlife habitat uses in Nebraska, and Nebraska seeks to protect the instream right created by the Grayrocks settlement against Wyoming's adverse claims. Wyoming has asserted that it is not a party to the Grayrocks agreement and that it may approve new

appropriations to divert the waters released from Grayrocks Reservoir for use in Wyoming. These threatened actions by Wyoming would undermine the minimum instream flows established by the Grayrocks agreement and would result in injury to wildlife habitat in Nebraska. Accordingly, the claims in the initial petition regarding Inland Lakes and Grayrocks Reservoir belie Wyoming's and Colorado's contentions that the amended petition somehow unduly or unnecessarily expands the scope of this case.

Nebraska's amended petition asserts claims regarding existing irrigation and wildlife habitat uses against both Wyoming and Colorado because Wyoming's answer to Nebraska's initial petition contends that the Decree does not restrict the current and proposed new and enlarged uses at issue in this case. Colorado makes similar claims with respect to the Laramie River and is in a similar position to Wyoming with respect to the relationship of Paragraphs X and XIII of the Decree. *See* Colorado's Brief in Opposition to Motion to Amend at 13-16. Both Colorado and Wyoming must be parties for Nebraska to receive complete relief on the issues raised in the initial petition, as well as for Nebraska to receive complete relief on the wildlife habitat issues raised in the amended petition.

Nebraska has sought relief against the United States in its capacity as a party in the amended petition because of the United States' involvement with the operation of existing and proposed projects on the North Platte system and also because of the United States' overriding interest in environmental protection issues. Although the specific water uses that support an apportionment of North Platte system waters for wildlife habitat purposes are located principally in Nebraska and to a lesser degree in the other states, the United States should be afforded an opportunity to participate in this case based on the multi-state or federal interests involved in the protection and maintenance of wildlife habitat.

Finally, Nebraska is constrained to respond to misleading statements in Wyoming's brief concerning the pending motion for summary judgment. Wyoming improperly attempts to create the impression that Nebraska has been dilatory in responding to Wyoming's motion and brief. Contrary to those assertions, Nebraska and the other parties have been directed by the Special Master not to respond to Wyoming's motion or brief until a decision is reached on the pending motions to intervene. Nebraska will dispute and contest the factual matters asserted and legal arguments raised in Wyoming's motion and brief. Nebraska will also establish the existence of genuine issues of material fact that preclude summary judgment and it will vigorously oppose the legal arguments raised by Wyoming.

Wyoming's protestations regarding its summary judgment motion are patently self-serving. Beyond the fact that there is ample precedent to support the proposition that the timing of a motion to amend can never be dispositive in itself, Wyoming neglects to make clear the procedural posture and status of its Rule 56 motion. Wyoming seems to argue that it has already won its motion, and that Nebraska has capitulated and not responded to the motion, instead choosing the route of moving to amend its petition. The fact is that Wyoming's motion is being held in abeyance by order of the Master. Once the Master rules on the various intervention motions, Nebraska will have sixty days to respond to the summary judgment motion. Nebraska is fully prepared to show that Wyoming's motion does not make a *prima facie* showing of entitlement to judgment as a matter of law, that genuine issues of material fact exist, and that Wyoming's contentions are deficient at every level of analysis. As a result, the procedural status of this case is a far cry from those situations where a party, instead of opposing a summary judgment motion, chooses to move to amend, thereby explicitly or implicitly acknowledging the force of the summary judgment motion. Nebraska is not constrained under Rule 15 to await rulings on the intervention motions and the summary judgment motion before raising its additional arguments.

In summary, Nebraska's amended petition seeks to preserve the delicate balance of the North Platte system established by the Decree through enforcing Nebraska's irrigation apportionment, through restricting Wyoming's current and threatened new and enlarged water uses, through establishing and protecting the water uses of the North Platte system for wildlife habitat purposes, and through placing

restrictions on new or expanded water uses in Wyoming and Colorado that would interfere with and adversely affect Nebraska's irrigation and existing wildlife habitat uses. Accordingly, the amended petition raises a justiciable controversy among the states that is properly within the Court's exclusive original jurisdiction.

REPLY TO BASIN ELECTRIC'S AND THE UNITED STATES' FILINGS

Nebraska does not respond in this brief to the motion for leave to respond and the response in opposition filed by Basin Electric Power Cooperative and the Memorandum filed by the United States. It is improper for Basin Electric Power Cooperative to file a response to Nebraska's motion for leave to file an amended petition because the Court's Order of January 25, 1988, specifically states that responses may be filed by the defendants in the case. The Court did not invite responses from the potential intervenors, and, therefore, Basin Electric's pleadings have been improperly filed with the Court. Nebraska takes no position with respect to the matters discussed in the United States' Memorandum, though it does not object to the course of action proposed in that Memorandum.

POINTS OF LAW

I.

THIS COURT'S RULES OF PROCEDURE AND CONTRCLLING CASES AUTHORIZE AMENDMENT OF THE PETITION.

This Court's procedural rules, coupled with Federal Rule of Civil Procedure 15(a), permit the amendment of Nebraska's petition to facilitate the presentation and final determination of this case on the merits. *See Conley v. Gibson,* 355 U.S. 41, 48 (1957) (pleadings are not an end in themselves but rather are mechanisms for promoting "a proper decision on the merits"). Wyoming's and Colorado's opposition to the proposed amendments is not supported by modern procedural policy or precedent. Nebraska's motion, however, is consistent both with the established procedures and the cases interpreting those procedures. Moreover, the notion that the justiciability doctrine may be used to avoid complex disputes between states is unsound both under the Constitution and under the Court's recent decisions *See, e.g., Idano ex rel. Evans v. Oregon,* 462 U.S. 1017 (1983).

A.

THE FEDERAL RULES OF CIVIL PROCEDURE STRONGLY FAVOR THE COURT'S GRANTING LEAVE TO AMEND THE PETITION.

Absent unusual circumstances, the procedural principles governing a lower federal court's consideration of a motion to amend serve as a guide to the Court's exercise of its original jurisdiction. While the Court is not required to apply the Federal Rules of Civil Procedure, it nonetheless has made express provision for resort to the federal rules. *See* Supreme Court Rule 9.2.

The policy of liberal amendment underlying Rule 15(a), coupled with ample precedent in the federal courts, support the amendment of Nebraska's petition. Rule 15 itself states that "leave [to amend] *shall* be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman v. Davis,* 371 U.S. 178, 182 (1962), the Court declared that "this mandate is to be heeded." The Court pointed out that the movant need not prove the final sufficiency of its claim as a predicate for amendment: "If the underlying facts or circumstances relied upon by a plaintiff *may be* a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."[1] *Id.* at 182 (emphasis

[1]The Court's decision in *Ohio v. Kentucky,* 410 U.S. 641 (1973), is not to the contrary. There the dispositive fact was that Ohio's proposed amendment was defective as a matter of law. Ohio's long acquiescence in the location of its border with Kentucky compelled one result. Accordingly, the Court concluded it need not approve an exercise in futility. This is precisely the same approach a federal trial court will take when a proposed amendment is facially defective. But such action is the procedural exception rather than the rule. It is enough for the movant to state a

added). In the present case, the issue of maintaining the existing stream flow regimen to protect wildlife habitat water uses not only may be a proper subject for relief, but is a proper subject for relief in the context of the equitable apportionment of the waters of an interstate stream. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017. Under Rule 15 and *Foman v. Davis*, 371 U.S. 178 (1962), Nebraska need not plead and prove as a threshold exercise every element of its claims.

Nebraska's proposed amendments fit within the established legal standards for approval of a motion to amend. In *Foman*, the Court pointed out that leave to amend should be freely given in the absence of reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182. None of these criteria applies to what Nebraska proposes. On the contrary, Nebraska will be substantially prejudiced if it is not allowed to raise and litigate the wildlife habitat issues.

Nebraska's amendments are timely and cannot be characterized as the product of undue delay. Thise case is still in the initial pleading stage, regardless of Wyoming's premature motion for summary judgment. The primary parties are awaiting the Master's decision on certain intervention motions, after which Nebraska has been directed to respond to Wyoming's motion, and discovery will proceed in the case. As discussed previously, Nebraska has reconsidered the issues that the Platte River Trust and National Audubon Society sought to raise in their proposed intervention petitions, and it has decided to

colorable claim. Moreover, Nebraska's amendments bear no resemblance to the facts or legal standards discussed in *Ohio v. Kentucky*. There can be no doubt that the maintenance of interstate stream flows for environmental purposes is an issue of critical importance and will remain so well into the next century. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal vacated and dismissed*, 594 F.2d 870 (8th Cir. 1979). As a result, Wyoming's reliance on *Ohio v. Kentucky* is inapposite in the present dispute. Environmental concerns would inevitably be part of any new interstate decree and must be recognized as part of the present administration of the North Platte Decree.

seek leave to raise those issues. Significant wildlife habitat interests in Nebraska will ultimately be extinguished by new and expanding uses of North Platte system waters in the upstream states, and Nebraska is therefore compelled to amend its petition to protect those habitat uses. In light of the procedural status of the case, Nebraska has not delayed unduly in raising these claims; the alternative of not raising those claims could result in the far more drastic and irreversible loss of important wildlife habitat in Nebraska and the North Platte and Platte River region in general.

Moreover, delay alone is never enough to deny leave to amend; there must be additional compelling negative factors present that require denial. *See, e.g., Duchon v. Cajon, Co.*, 791 F.2d 43 (6th Cir. 1986); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1986), *cert. dismissed*, _____ U.S. _____, 107 S.Ct. 450 (1986). The issue of delay inevitably relates to the question of undue prejudice to the party opposing the motion to amend. This is because undue prejudice primarily arises in situations where the movant seeks to amend at or shortly before trial. *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986) (the element of prejudice applies essentially where the amendment is offered shortly before or during trial). As the court indicated in *North Eastern Mining Co. v. Dorothy Coal Sales, Inc.*, 108 F.R.D. 657 (S.D. Ind. 1985), virtually every amendment of a complaint results in some degree of prejudice to the defendant. While discovery will be delayed, the delay is insufficient to deny the motion to amend. *Id.* Prejudice warranting denial of the motion to amend must be undue and of the sort that occurs on the eve of trial when a litigant seeks to inject a wholly unexpected legal claim that has not been the subject of discovery.[2] Because limited discovery

[2]The facts of the case do not present a situation of unfair surprise to the opposing parties. Nebraska raised environmental concerns in its initial brief. Secondly, the Inland Lakes dispute implicitly involves wildlife habitat concerns. Third, the Grayrocks Stipulation came into existence because of Nebraska's concerns that minimum instream flows be protected. It is Wyoming's express intention to contravene the Grayrocks Stipulation and its environmental covenants that prompted Nebraska's initial Grayrocks claim. Finally, in the permitting process for Wyoming's Deer Creek project, Nebraska has been actively involved in

has been had in this case, there can be no undue delay or prejudice from any change in the scope of discovery. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 569 (3d Cir. 1976) (the necessity for defendant to conduct further discovery is insufficient to show prejudice).

The legal meaning of prejudice, moreover, does not encompass mere inconvenience, and Wyoming's reliance on inconvenience as a means of demonstrating prejudice is also an improper objection to amendment of pleadings. Indeed, the analysis of prejudice is the central focus for whether an amendment is permissible. Wyoming, however, distorts the terms of that analysis. Federal courts acknowledge that prejudice to the non-moving party is the "touchstone" for the denial of a proposed amendment. *See, e.g., Heyl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981). Many courts translate the liberality of Rule 15(a) into a general presumption in favor of allowing amendment. *See Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984). In turn, this presumption can be overcome only by a showing that the amendment will be prejudicial. *Id.* Prejudice is not a concept of unlimited flexibility. To the contrary, prejudice is determined strictly. In *Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802 (D. Del. 1986), the court stated as follows:

> Prejudice does not mean inconvenience to a party. Moreover, it is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the nonmoving party must show that is was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.

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raising environmental issues associated with the depletion of flows put to wildlife habitat uses. As a result of these factors, none of the opposing parties can claim unfair surprise. *See Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787 (2d Cir. 1986) (party cannot claim unfair surprise from amendment when it has been provided with notice of the subject matter of the amendment well in advance of the actual motion to amend).

Id. at 806. *See also Heyl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419. Wyoming makes no showing that it is unfairly disadvantaged or that it will be incapable of presenting rebuttal evidence. Wyoming's basic contention is that the amendments will prove troublesome in carrying out its program of expanding water use on the North Platte system that depletes Nebraska's irrigation apportionment and existing wildlife habitat water uses. Consequently, Wyoming's resort to notions of delay and inconvenience is legally defective.

Wyoming's reliance on the fact that Nebraska's motion to amend was filed after Wyoming's summary judgment is equally unavailing. In general, the timing of a motion to amend is not dispositive. *See Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802. There are numerous decisions showing that the fact that a motion to amend is made after a motion for summary judgment is filed does not require denial of the motion to amend. *See Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929; *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979). ("A party is free to move for leave to amend, even after a motion for summary judgment has been made by the opposing party, and the ordinary standards of Rule 15(a) . . . apply to the court's determination whether to allow amendment."); *Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802; *Artman v. International Harvester Co.*, 355 F.Supp. 476, (W.D. Pa. 1972); 3 J.W. Moore, *Moore's Federal Practice* Para. 15.10 (1987). The fact that Wyoming's motion for summary judgment has been held in abeyance pending action by the Master on the intervention motions is an additionl indication that Wyoming will suffer no undue prejudice from amendment. Thus the weight of authority, along with the procedural realities surrounding Wyoming's Rule 56 motion, establish that the timing of Nebraska's motion to amend is not a dispositive factor. Wyoming's misplaced reliance on the proposed amendment coming after its summary judgment motion is of no legal consequence and should be rejected by the Court.

In sum, the applicable legal standards for the amendment of pleadings demonstrate the propriety of Nebraska's proposed amend-

ments. The Court's promulgation of a liberal standard in Rule 15(a), coupled with the decision in *Foman v. Davis*, establish a framework favoring amendment. None of the bases for denial of leave to amend is present in this case. Nebraska has neither delayed unduly in proposing its amendments, nor will Wyoming be denied the opportunity to present facts and evidence in opposition to Nebraska's claims. No discovery deadline, pretrial order, or trial setting yet exists in this proceeding. All parties will have a full and fair opportunity to address the additional claims and conduct the discovery associated with those claims. Any "inconvenience" incurred by Wyoming is necessary to implement the Court's declared objective that technical pleading be discarded and that complete adjudication of a case on the merits is the purpose of our procedural system. Wyoming has simply failed to demonstrate any valid reason for denying the proposed amendment of Nebraska's petition.

B.

THE INTERSTATE WATER CLAIMS ASSERTED IN NEBRASKA'S AMENDED PETITION CONSTITUTE A JUSTICIABLE CONTROVERSY PROPERLY WITHIN THE COURT'S EXCLUSIVE ORIGINAL JURISDICTION.

The issue of establishing and protecting wildlife habitat water uses in Nebraska and other North Platte system states raises serious and important concerns of federalism that are properly within the purview of the Court's original jurisdiction. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). Wyoming and Colorado portray the Court's exercise of original jurisdiction as one in which the Court timidly seeks to avoid involvement in "complicated" disputes between states. Not only is their argument legally untenable, it also ignores the Court's long-standing commitment to resolve controversies involving sovereign states within our system of federalism.

As a necessary correlative of discharging its original jurisdiction obligations, the Court liberally permits the development of the facts in interstate disputes. This broad-based development of the facts is an additional reason supporting Nebraska's motion to amend its

original petition. *See, e.g., United States v Texas*, 339 U.S. 707, 715 (1950), in which the Court stated that "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance [the Court] has always been liberal in allowing full development of the facts." In interstate controversies, the starting point for the Court must be the full development of the facts, rather than Wyoming's vision of a limited proceeding in which hypertechnical pleading requirements prevent sovereign states from having their claims decided on the merits.

The Court has been willing to provide a forum for the vindication of the rights and justifiable expectations of the states. In particular, the interstate water disputes in the arid and semi-arid western states have consistently been viewed by the Court as presenting issues of great importance. Thus, in what is now the seminal expression of the Court's views, the Court declared in *Kansas v. Colorado* that:

> [W]henever ... the action of one State reaches through the agency of natural laws into the territory of another State, *the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them*, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

206 U.S. 46, at 97-98 (emphasis added).

Wyoming's and Colorado's narrow views of what constitutes a justiciable dispute between two or more states ignores the applicable precedent in interstate water disputes and seeks to create an improper criterion for denying leave to amend. As stated above, the proper criteria for assessing the motion exist under the Rules of Civil Procedure and the relevant federal precedent. Consequently, beyond the deficiencies of Wyoming's and Colorado's proposed additional procedural standard, their justiciability arguments ignore the Court's willingness to permit the full adjudication of interstate water disputes.

The complexity of issues presented in interstate disputes is not a proper rationale for limiting or denying the exercise of original jurisdiction. The Court has rejected that general proposition in several recent cases, as well as rejecting a similar contention in the original phase of this litigation forty years ago. In *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, for example, the Court refused to accept the contention that complexity in the formulation of interstate decrees is a justification for not issuing an equitable decree. That case involved novel questions regarding the preservation of certain fish species with an interstate habitat. Those questions were not directly related to the traditional issues of priority and apportionment of the waters of an interstate stream. Both the majority and dissenting opinions in the case, however, concluded that the unfamiliar issues were susceptible to treatment under the equitable apportionment doctrine. The Court stated that "[a]lthough the computation [regarding interstate apportionment of the fish] is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree." *Id.* at 1027; *see also id.* at 1038 (O'Connor, J., dissenting) "... the difficulty of providing equitable relief has never provided an excuse for shirking the duty imposed on us by the Constitution.") Indeed, the Court questioned the Special Master's apparent reluctance to engage in the preparation of equitable relief addressing those difficult issues in an earlier phase of the same litigation. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980) ("The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning runs of anodromous fish and because the Court might have to retain continuing jurisdiction over the management of the fisheries in the Columbia and Snake Rivers.") The Court expressly rejected the Master's proposed basis for dismissal and referred to the original North Platte decree as an expression of its willingness to address complicated and protracted interstate disputes. *Id.*

Significantly, the Court returns again and again to that earlier expression in this case, 325 U.S. 589, of its policy with regard to continuing jurisdiction over complex disputes:

> There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province ... A genuine controversy exists ... The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.

Id. at 616. Thus, Wyoming's arguments that the justiciability doctrine requires that the Court avoid complex and long-term problems are disingenuous in light of the Court's prior determination of the existence of a genuine controversy not subject to easy resolution. Furthermore, Nebraska disputes that the claims for existing wildlife habitat water uses will be any more complex, technical, or time consuming than the claims for the irrigation apportionment.

Finally, both the majority and dissenting opinions in *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, make clear that the novelty of issues affecting interstate relationships is no barrier to the exercise of original jurisdiction. The majority pointed out that as in a classic water dispute, upstream and downstream states are related by principles of cause and effect. The Court then recognized the analogy to traditional water disputes by stating that "[a] dispute over the water flowing through the Columbia-Snake River system would be resolved by the equitable apportionment doctrine; *we see no reason to accord different treatment to a controversy over a similar natural resource* of that system." *Id.* at 1025. As a result, what Nebraska proposes is consistent with this view of original jurisdiction. *See also id.* at 1031 n.1 (O'Connor, J., dissenting) ("Disputes between sovereigns over migratory wildlife typically give rise to diplomatic solutions," and similar interstate disputes are therefore "particularly appropriate for resolution by this Court in the exercise of its original jurisdiction.") Wyoming's and Colorado's justiciability arguments are plainly at odds with the Court's prior decisions. If the mainte-

nance or regulation of instream flows for the protection of wildlife habitat is in fact an important interstate or federal interest, any complexity that might be attributed to such an interstate apportionment is insignificant in terms of the exercise of the Court's jurisdiction.

II.

PARAGRAPH XIII OF THE DECREE AUTHORIZES THE RELIEF FOR WILDLIFE HABITAT WATER USES REQUESTED IN NEBRASKA'S AMENDED PETITION.

Paragraph XIII of the Decree provides the necessary authority for Nebraska's amended petition seeking enforcement, construction and modification of the Decree. Paragraph XIII recognizes that the Court's future involvement might be necessary to resolve problems on the North Platte system. It contemplates the need for ongoing flexibility in the Decree's administration by empowering the Court to retain "jurisdiction of this suit for the purposes of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." 325 U.S. at 671. Paragraph XIII states that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief," *id.*, and includes "[a]ny change in conditions making modification of the decree or the granting of further relief necessary or appropriate" as well as additional specific questions as "[m]atters with reference to which further relief may hereafter be sought." *Id.* at 671-672.

Wyoming insinuates that Nebraska's amended petition constitutes an abuse of Paragraph XIII. Wyoming Brief in Opposition to Motion to Amend Petition at 19. Yet the Special Master and the Supreme Court in *Nebraska v. Wyoming* specifically intended that the parties to the equitable apportionment have the ability to seek further relief or modification of the decree if circumstances on the North Platte system changed. They regarded a provision for retention of jurisdiction as an essential component of the Decree. Special Master Michael J. Doherty recommended to the Court:

> (1) A present decree effecting a water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes. (2) Retention by the Court of jurisdiction to amend the decree if and when it shall be made to appear that important changes of condition have occurred or that any assumption or forecast as to the future upon which the decree was based has by subsequent experience proved erroneous, and that by reason of such changes of condition or errors of prediction equity requires amendment of the decree. Report of Special Master at 122.

In explaining why a decree containing a retention of jurisdiction provision was preferable to a decree providing for "final or unalterable distribution of the water or benefits of the river", Report at 121-122, the Master stressed the "uncertainty and impermanence in the present situation." Report at 121.

Viewing the North Platte system situation realistically, the Court adopted the Special Master's recommendation that it retain jurisdiction to address future problems on that system. *Nebraska v. Wyoming*, 325 U.S. at 655. It declared that "the decree which is entered must deal with conditions as they obtain today." *Id.* at 620. It observed that "[i]f they substantially change, the decree can be adjusted to meet the new conditions," *id.* at 620, and that the Decree was not "necessarily . . . for all time." *Id.* at 623.

Paragraph XIII embodies the Special Master's and Court's realistic awareness that conditions on the North Platte system might change and that the Court needed to have the flexibility to address these changes. Nebraska's amended petition draws to the Court's attention changes of condition on the North Platte River that threaten to disrupt the long-established regimen of stream flow established by the Decree. Those changes have been repeatedly recognized in national and state legislation designed to protect environmental interests that were of little concern in 1945. Thus, Nebraska invokes Paragraph XIII for precisely its intended function.

In *Arizona v. California*, 460 U.S. 605 (1963), the Court stated that its "purpose in retaining jurisdiction in [original actions] can be

gleaned from the respective reports of the Special Master, which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree." *Id.* at 624, citing to the Special Master's Report in *Nebraska v. Wyoming* as an example. *Id.* at 624 n. 17. Accordingly, the Court found that it was appropriate to use a retention of jurisdiction provision for the "consideration of new issues and changed circumstances." *Id.* at 625. Unlike the United States and the Tribes in *Arizona v. California*, Nebraska is not using a retention of jurisdiction provision to relitigate a previous factual determination. Rather, Nebraska properly invokes Paragraph XIII to seek enforcement, construction, and modification of the Decree in view of changed circumstances on the North Platte system. These changed circumstances involve actual and threatened development and its concomitant environmental effects. Wyoming's current and threatened expansion of water uses places an unprecedented stress on the North Platte system's water supply. This expansion includes the increased usage of Laramie River waters, the proposed construction and operation of the Corn Creek and Deer Creek Projects, and adverse legal claims against the water supply of the Inland Lakes. If Colorado, like Wyoming, interprets Paragraph X of the Decree as a blanket exemption for municipal water development on the North Platte River, Colorado's expanded municipal water uses also pose a threat to the apportionment effected by the Decree. In response to these threats to its irrigation apportionment, Nebraska asks the Court to enforce the Decree and to restrict new and expanded uses of North Platte system waters.

The new or expanded uses of North Platte system waters also threaten the wildlife habitat water uses that the Court has already established through the stream flow regimen in the Decree. Nebraska seeks formal recognition of these wildlife habitat water uses through construction or amendment of the Decree before upstream development on the North Platte system results in their elimination. This formal recognition by the Court would comport with the policy of environmental protection embodied in the myriad of environmental laws that Congress has passed since 1945.

Finally, the relief requested in Nebraska's amended petition would promote certainty of water rights on the North Platte system. The Court has determined that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. at 620. Nebraska's amended petition does not seek to undo what the 1945 Decree in *Nebraska v. Wyoming* accomplished by relitigating previously decided issues. Rather, faced with conditions on the North Platte system that are changing due to new development, Nebraska requests the Court to enforce the irrigation apportionment and to construe or modify the Decree to allow for the recognition of sufficient water to protect existing wildlife habitat uses. This approach will prevent piecemeal determinations that could further confuse the already uncertain status of water rights on the North Platte. A comprehensive decree recognizing wildlife habitat uses would ensure certainty of water rights by formalizing what has previously been implicit. Such a decree would enable each basin state to manage existing water uses and to plan new water development.

III.

THIS COURT'S DECREE PERMITS THE ASSERTION OF NEBRASKA'S WILDLIFE HABITAT CLAIMS, AND FEDERAL ENVIRONMENTAL LEGISLATION DOES NOT PREEMPT THOSE CLAIMS.

Nebraska's amendments request an apportionment of the waters of the North Platte system to protect wildlife interests and to provide full judicial recognition of the wildlife habitat uses that depend on the regimen of the river established by the Decree. Those habitat uses constitute environmental interests that require the attention of this Court as the arbiter of this interstate dispute.

The flexibility insisted upon by the Court in the original Decree permits the rejection of a rigid adherence to discredited federal water policies. This flexibility must respond to the effects of additional projects or storage "not now existing," Para. XIII(b) and (c), and respond to "[a]ny change in conditions", Para. XIII(f). *Nebraska v. Wyoming*, 325 U.S. at 671-672. As a result, the Decree

encompasses all water uses that are necessary to maintain the economic and environmental interests of each state.

Since 1945, there has been a greater recognition and emphasis on the importance of environmental resources in this country. The importance of preserving water quality and instream flows for environmental purposes, now firmly entrenched in the nation's public policy, was nonexistent at the time the Decree was entered. *See id.* at 596. Federal legislation, requiring that wildlife conservation receive "equal consideration" and be coordinated with all other features of water resource development programs, recognized the use of water for wildlife habitat as a valid beneficial use. *See e.g.*, Fish and Wildlife Conservation Act of 1980, 16 U.S.C. § 2901 *et seq.* (1982); Electric Consumer Protection Act of 1986, 16 U.S.C. §§ 791(a), 797(e) (1982 & Supp. IV 1986) Both Nebraska and Colorado have enacted laws dealing with appropriations of instream flows. *See* Neb. Rev. Stat. § 46-2, 108 (Cum. Supp. 1986) and Colo. Rev. Stat. § 37-92-102(3) (Cum. Supp. 1987). This Court has recognized that the Decree is an evolving instrument requiring "delicate adjustment of interests" and "the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. 176 (1982). Environmental concerns are now a necessary component of the Court's apportionment of interstate streams. *See generally, Idaho ex. rel. Evans v. Oregon*, 462 U.S. 1017. To ignore them would ignore the modern reality of federal and multi-state interests in interstate waters.

Wyoming and Colorado previously objected to the modification provision in Paragraph XIII of the Decree. Colorado, as it does today, contended that the provisions would result in an "administrative burden" requiring continued supervision by the Court. Wyoming also sought to foreclose future considerations of the proper apportionment. The Court rejected both states' attempts to impede the Court's supervision of the North Platte Decree and determined that these claims were "no justification for us to refuse to perform the important function entrusted to us by the Constitution." *Nebraska v. Wyoming*, 325 U.S. at 616.

Nebraska does not seek to apply or enforce in this case the examples of federal environmental legislation cited in its amended petition and supporting brief. The claims asserted by the proposed amendments concern the equitable apportionment of interstate waters and not the enforcement of federal environmental statutes. Nebraska's claims for wildlife habitat water uses depend on the stream system regimen established by the Decree and by nearly a half century of the Decree's administration. Nebraska is cognizant of the fact that the environmental statutes are not intended to apportion or otherwise establish water rights among states on an interstate stream system. Nebraska's citations to representative federal statutes merely show the national interest in environmental protection and provide an additional compelling policy reason for this Court's examination of the apportionment for non-irrigation beneficial uses.

The Court retains the power to construe and modify the Decree to provide for instream flow regulation of the North Platte system to protect wildlife interests. It is equally plain that the exercise of this power does not transform the Court into a super-adminstrator of existing federal environmental legislation. Nebraska in no way seeks to usurp or bypass the regulatory systems set up under this legislation. Rather, the proposed amendments attempt to insure that the burden of the maintenance of the regimen of the river, including both consumptive and instream beneficial uses, falls equally on all states benefiting from this Court's apportionment.

In their responses to Nebraska's motion, Wyoming and Colorado seek to assure the Court that "without the Court's involvement" existing federal law will fully protect wildlife habitat from any harmful impacts of water development projects in Colorado and Wyoming. These arguments avoid the real impact on present wildlife habitat uses of any apportionment that does not account for those uses. The arguments propounded by Wyoming also fail to acknowledge its actions now and in the past, often under the aegis of the Decree, which have attempted to avoid the effects of federal environmental legislation. These actions include *inter alia*, Wyoming's proposed avoidance of the Grayrocks Stipulation and the re-

prioritization of the Inland Lakes rights. In asking the Court to refuse to account for the present beneficial uses of instream flows to maintain wildlife habitat in Nebraska, Colorado and Wyoming ask this Court to set ecological concerns aside so that these issues may be decided in a piecemeal fashion by federal agencies or lower federal courts that have absolutely no control or authority over the interstate apportionment of water.

A decision by this Court to include non-consumptive uses within the calculus of values to be protected in any apportionment of the North Platte will have a two-fold effect. First, it will clarify the conflict that now exists between the protection of wildlife habitat water uses and the interests expressly recognized in the Decree. For example, in an attempt to discount the need for the Court's consideration of contemporary ecological problems in the North Platte system Wyoming and Basin Electric point to the Platte River Management Joint Study as a cooperative effort involving the federal government, Nebraska, Wyoming, and Colorado. Beyond the fact that this study has no binding effect on any of the participants, however, its own Statement of Purpose points to the perception that the Decree somehow stands in the way of compliance with the Endangered Species Act. The statement encourages federal agencies to proceed "in compliance with the Endangered Species Act while avoiding conflict between the . . . Act and the . . . use of water apportioned to a state pursuant to the compact and decrees concerning waters of the North Platte and its tributaries." In Nebraska's opinion, the Decree must be interpreted as consistent with wildlife habitat water uses.

Secondly, such a decision will send a message to the states bound by the Decree and to the agencies of the United States responsible for water storage and irrigation projects that the Decree cannot be used to undermine federal environmental legislation. The trumping of federal environmental policy by an interstate apportionment that ignores that policy has demonstrable negative consequences:

> [I]t is unlikely that either the federal government or a lower Court will look beyond any water apportionment decrees by this court. . . . For example, if this Court were to hold that Wyoming

> is entitled to certain amounts of the natural flow of the North Platte and can store that water at the Deer Creek Project, it will be very difficult to convince a district court that federal implementation of this Court's decree should be halted, and that the federal government should consider whether to modify the effect of this court's decree because of the possibility of jeopardy to an endangered species.

National Audubon Society Brief in Support of Motion to Intervene at 8, 9. Irrevocable injury will be done to wildlife habitat water uses without the comprehensive apportionment called for by Nebraska's proposed amendments. The complete investigation of the needs for minimum instream flows in the North Platte system will enable the Decree's protection of all the vital federal and interstate interests on the North Platte.

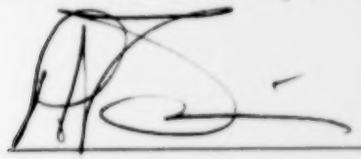
CONCLUSION

Neither the State of Wyoming nor the State of Colorado can deny that there has been a profound change in federal and state interests in the protection of the environment since the Decree was entered in 1945. Nor can either state deny that the Court retained jurisdiction in Paragraph XIII of the Decree in order to clarify, adjust, or modify the decreed apportionment to meet changed conditions. Accordingly, the Court should recognize the public interest in the protection of environmental values and grant Nebraska's motion to amend in order to protect those interests through an effective and thorough interstate apportionment.

Respectfully submitted,

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No. 108, Original

IN THE

Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Reply Brief to Briefs and the Memorandum in Filed Opposition to Nebraska's Motion to Amend Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree were served on each of the following parties required to be served, in accordance with United States Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 4th day of March, 1988 to:

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